

IN THE UNITED STATES BANKRUPTCY COURT

FOR THE

SOUTHERN DISTRICT OF GEORGIA
Augusta Division

IN RE:)	Chapter 7 Case
)	Number <u>97-11745</u>
WILLIAM MARK CONOVER)	
JANE ONISK)	
)	
Debtors)	
)	
UNITED STATES TRUSTEE)	FILED
)	at 2 o'clock & 20 min. P.M.
Movant)	Date: 1-20-98
)	
vs.)	
)	
WILLIAM MARK CONOVER)	
JANE ONISK)	
)	
Respondents)	

ORDER

In response to the Motion to Dismiss filed by the United States Trustee, the Debtors in this chapter 7 case, William Conover and Jane Onisk, filed a motion for summary judgment requesting the denial of the U.S. Trustee's motion. Debtors filed for chapter 7 relief on July 9, 1997. The debt listed in the schedules includes \$17,909.83 in priority and non-priority unsecured federal and state income taxes, plus federal income taxes of Mr. Conover for 1996

listed as unknown. The schedules also include \$11,428.00 of other debt, which is almost exclusively consumer debt on credit cards. The total debt is \$29,337.83. The U.S. Trustee filed a motion seeking dismissal of the case under § 707(a) or (b)¹, or, upon the Debtors' request, conversion to chapter 13 under 11 U.S.C. § 706(a). The U.S. Trustee argues that the debt is primarily consumer debt, so § 707(b) "substantial abuse" applies; or § 707(a) "unfair delay by the debtor that is prejudicial to creditors" applies to debtors' filing of chapter 7. The Debtors contest the applicability of §707(b) to their case contending that their debts are not "primarily" consumer debt. Debtors' motion did not address the § 707(a) claim and they did not request conversion under § 706(a).

¹11 U.S.C. § 707(a)&(b). Dismissal

(a) The court may dismiss a case under this chapter only after notice and a hearing and only for cause, including—

(1) unreasonable delay by the debtor that is prejudicial to creditors;

(2) nonpayment of any fees or charges required under chapter 123 of title 28, and

(3) failure of the debtor in a voluntary case to file, within fifteen days or such additional time as the court may allow after the filing of the petition commencing such case, the information required by paragraph (1) of section 521, but only on a motion by the United States trustee.

(b) After notice and a hearing, the court, on its own motion or on a motion by the United States trustee, but not at the request or suggestion of any party in interest, may dismiss a case filed by an individual debtor under this chapter whose debts are primarily consumer debts if it finds that the granting of relief would be a substantial abuse of the provisions of this chapter. There shall be a presumption in favor of granting the relief requested by the debtor.

The issue is whether federal and state income tax debt constitutes "consumer debt" under § 707(b). Partial summary judgment is granted to the Debtors on the § 707(b) assertion. Summary judgment is denied as to the § 707(a) assertion and a continued status conference will be set.

This court has jurisdiction to hear this matter under 28 U.S.C. § 157(b) (2) (A) and 28 U.S.C. § 1334. The standard of review for a motion for summary judgment is that applicable to Rule 56 of the Federal Rules of Civil Procedure ("FRCP") which is incorporated into bankruptcy practice by Federal Rule of Bankruptcy Procedure (FRBP) 7056. FRCP 56(a) provides that "(a) party seeking to recover upon a claim ... may, at any time after the expiration of 20 days from the commencement of the action or after service of a motion for summary judgment by the adverse party, move with or without supporting affidavits for a summary judgment in the party's favor upon all or any part thereof." The moving party bears the burden of proof that "there is no genuine issue as to any material fact and that the moving party is entitled to judgment as a matter of law." FRCP 56(c). See generally Celotex Corp. v. Catrett, 477 U.S. 317, 106 S. Ct. 2548, 91 L. Ed. 2d 265 (1986); Clark v. Coats & Clark, Inc., 929 F.2d 604, 608 (11th Cir. 1991); Cowan v. J.C. Penney Co., Inc., 790 F.2d 1529 (11th Cir. 1986). Thus, "[t]o prevail on a motion for summary judgment, [the movant] must prove there is no

dispute as to any material fact and based on the material facts, to which the parties are in agreement, [the movant] is entitled to judgment as a matter of law.” Haile Co. v. Reynolds Tobacco Co., et al. (In re Haile Co.), Chapter 11 case No. 88-40864, Adv. 90-4118 slip op. at p. 5 (Bankr. S.D. Ga. Sept. 27, 1991) (Dalis, J.). “In determining whether the movant has met its burden, the reviewing court must examine the evidence in a light most favorable to the opponent of the motion. All reasonable doubts and inferences should be resolved in favor of the opponent [to the summary judgment motion].” Amey, Inc. v. Gulf Abstract & Title, Inc., 758 F.2d 1486, 1502 (11th Cir. 1985) (citations omitted), cert. denied, 475 U.S. 1107, 106 S. Ct. 1513, 89 L. Ed. 2d 912 (1986). See also Adickes v. S.H. Kress & Co., 398 U.S. 144, 90 S. Ct. 1598, 26 L. Ed. 2d 142 (1970). As summary judgment is a drastic remedy, it should not be granted unless the movant establishes “that the other party is not entitled to recover under any discernible circumstances.” Robert Johnson Grain Co. v. Chemical Interchange Co., 541 F.2d 207, 209 (8th Cir. 1976) (emphasis added). Accord In re Marks, 40 B.R. 614 (Bankr. D.S.C. 1984). Summary judgment is appropriate partially to resolve this matter as material debt amounts are conclusively provided and remaining is an interpretation and application of the United States Code and relevant case law. FRBP 7056 applies in a contested matter. FRBP 9014.

The U.S. Trustee argues that personal income tax debt is "consumer debt" under § 707(b) and, pursuant to that section, the Debtors' case should be dismissed for substantial abuse. "Consumer debt" is defined by 11 U.S.C. § 101(8) as "debt incurred by an individual primarily for a person, family, or household purpose." Most case law interprets "consumer debt" under 11 U.S.C. §§ 101(8) and 1301. See e.g., In re Pressimone, 39 B.R. 240 (N.D.N.Y. 1984); In re Dye, 190 B.R. 566 (Bankr. N.D. Ill. 1995); In re Greene, 157 B.R. 496 (Bankr. S.D. Ga. 1993); In re Traub, 140 B.R. 286 (Bankr. D.N.M. 1992); In re Gault, 136 B.R. 736 (Bankr. E.D. Tenn. 1991); Goldsby v. United States (In re Goldsby), 135 B.R. 611 (Bankr. E.D. Ark. 1992); In re Reiter, 126 B.R. 961 (Bankr. W.D. Tex. 1991); Harrison v. Internal Revenue Serv. (In re Harrison), 82 B.R. 557 (Bankr. D. Colo. 1987). However, "§ 101(8) is an omnibus section which applies to all sections of the Code." In re Traub, 140 B.R. at 288. The bankruptcy court for the Southern District of Georgia holds income tax liability is not a "consumer debt" under § 101(8). See In re Greene, 157 B.R. at 497. Income tax liability is incurred while earning income, not by consumption. See id.

The U.S. Trustee essentially asks this court to apply the definition of "consumer debt" under § 101(8) differently between sections of the Bankruptcy Code. The U.S. Trustee failed to provide any case law holding that income tax debt is consumer debt under any

Bankruptcy Code section. Because of its omnibus application, § 101(8) applies identically to define "consumer debt" throughout the Bankruptcy Code. Income tax debts are not consumer debts under § 101(8) and, thus, § 707(b). See In re Traub, 140 B.R. at 288 (income tax debts are not consumer debts under §§ 101(8) and 707(b)). See also In re Nolan, 140 B.R. 797 (Bankr. D. Colo. 1992) (in applying § 707(b), non-consumer debt includes state and federal tax debts).

Section 707(b) only applies if the debt is "primarily consumer debts." Sixty-one percent of the debt in this case is tax debt, which is not consumer debt. At least half of the debt must be consumer debt for § 707(b) to apply. See Matter of Booth, 858 F.2d 1051, 1055 (5th Cir. 1988). This debt is not "primarily" consumer debt, and § 707(b) is inapplicable.

It is, therefore, ORDERED that Debtors' motion for summary judgement is partially granted as to the 11 U.S.C. § 707(b) allegations of the U.S. Trustee.

JOHN S. DALIS
CHIEF UNITED STATES BANKRUPTCY JUDGE

Dated at Augusta, Georgia
this 16th day of January, 1998.